Filed 10/13/09 In re Ramiro G. CA1/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

In re RAMIRO G., a Person Coming Under the Juvenile Court Law.	
THE PEOPLE, Plaintiff and Respondent, v. RAMIRO G., Defendant and Appellant.	A123291 (Solano County Super. Ct. No. J38364)

Ramiro G. was initially declared a juvenile ward in April 2008 and was placed on probation supervision in his mother's custody. The current appeal arises from an amended petition (Welf. & Inst. Code, § 602, subd. (a)) of September 2008[1] charging the 14-year-old with vandalism and gang-promotion (count 1; Pen. Code, §§ 594, subd. (a), 186.22, subd. (d)), and a probation violation (count 2; § 777, subd. (a)(2)). This concerned his arrest, with three other youths, for spray painting at a Vacaville middle school. At a joint jurisdictional contest with charged co-perpetrator, Richard C., the court sustained the allegations as to Ramiro, but not as to Richard.

At disposition on November 12, the court continued wardship and placed Ramiro back in his mother's custody, on modified probation. Ramiro appeals, claiming

[1] Unspecified further section references are to the Welfare and Institutions Code, and all unspecified further dates are in 2008.

insufficient evidence, erroneous admission of hearsay about his gang moniker, and error in setting a maximum term of confinement.

We affirm the judgment.

BACKGROUND

Four minors were arrested for the vandalism, but two were not charged. Ramiro and Richard were, and the main issue at the contest was identity. Neither minor testified. The court ultimately dismissed Richard's petition, voicing doubt as to him, but sustaining the allegations as to Ramiro.

The neighbor. Daniel Cullinan lived near Jepson Middle School, and was walking in its field area at dusk on September 20 when he saw two youths writing something on the far west wall of the school. There were no streetlights, and he may or may not have had his corrective lenses on that evening, but from 50 feet behind, he saw that both youths were light skinned and wore white shirts and black shorts. Cullinan did not see spray cans in their hands, but assumed they had them because they were "motioning like this" (gesture unexplained); and there was spray paint on the wall that had not been there the day before. The paint on the wall was "[g]old and red or goldish, reddish, silver maybe or [with] some kind of a tint to it." Cullinan did not see their faces, but one was taller than the other.

Cullinan thought he might have "startled" the two, for they walked away and, as he watched, "caught up with two other guys" just behind a baseball dugout 50 yards from him. The two others were differently dressed, one in dark shorts and a red shirt, the other in dark trousers and a white shirt. There were "other people on the track and with dogs," and all four youths "left, quickly," walking away as soon as they were together.

Cullinan was soon contacted at home by a police officer, who took him to view four youths detained a quarter to a half mile from the school. It was still dusk and was 30 to 45 minutes after he had seen the youths at the school. Due to their distinctive attire, Cullinan was able to identify the one with the trousers and the one with the red shirt as *not* being the ones who wrote on the west wall.

Officer accounts. Vacaville police officers Jason Johnson and Andy Stefenoni separately went to the scene on a call of vandalism at the school, and each testified below. Stefenoni arrived within five minutes. Checking first the front of the school and surrounding area, he quickly located and detained four youths at the corner of "Eldridge and Fur," one to two blocks away, who matched the call description. He "asked them if they have been at Jepson school, and collectively they said no." The youths were Ramiro, who "goes by Eddie," Richard C., and two surnamed Martinez and Gonzalez. On Ramiro's hands, Stefenoni "noticed gold paint, spray paint on the right index finger [and] webbing in between the thumb and index finger." When later examining the gold and brown paint sprayed at the school, Stefenoni found it consistent with the paint he had seen on Ramiro. Ramiro was the only one with long pants; he wore a white T-shirt, black jean pants, and "[b]lack Nikes with a red swoosh." Martinez wore a red belt.

Richard was considerably taller than the others and had no paint on his hands. He wore a "white" Pittsburgh Pirates shirt and dark shorts. In contrast to Cullinan's testimony that he identified Ramiro and Richard as *not* being the ones he saw spray painting on the wall, Stefenoni testified that Cullinan identified Richard as one of those youths. At further variance from Cullinan's account, Stefenoni also stated that neither of "the two minors" (apparently meaning the ones in court, Ramiro and Richard) wore a red shirt.

Officer Johnson arrived second on the scene, around 7:30 p.m. He saw no one matching the descriptions but went to Cullinan's home upon hearing that Stefenoni had four suspects detained. He took Cullinan to the field show up, reading him a standard admonishment, and noticed that the four detainees matched the call description. Johnson testified, as his fellow officer did, that Cullinan identified Richard as one who was tagging the west wall. Johnson also related that Cullinan identified all four as involved—Martinez being with Richard at the wall when "Norte" was being written, and Ramiro and Gonzalez as being near the dugout. Johnson first testified that Richard was the only one wearing pants but, upon reviewing photos he had taken at the scene, conceded that it was Ramiro rather than Richard.

Johnson helped Stefenoni arrest the four and then "walked the scene" of the vandalism with Cullinan. It was about 8 p.m., and at the west wall, Johnson photographed 11 distinct spray-painted markings, including "Norte" (brown and gold), "NA," "BSL," a one "with four dots" (gold), the roman numerals "XIV" (gold), "SK" (gold), a figure like an "I" (gold), "Little Savage" or "Little Sav" (brown), "UFD," "X4," "U.S.A," and "LOK" or "Loc." Having seen thousands of graffiti markings in his work, he opined that all of these were fresh, "brand new," and certainly no more than one or two days old. He did not smell fresh paint or see discarded spray cans, and no cans had been found on the detainees. Johnson's training and experience investigating criminal street gangs told him that "Norte" connoted the Norteno, and "BSL" a local subset known as Brown Street Locos. "SK" stood for scrap killer.

In the dugout area and on an equipment container there, Johnson saw some older painting but also fresh paint, especially a gold "I" symbol matching one on the west wall, and a silver "BSL." Stefenoni described as "oversight" on his part his failure to photograph the gold paint on Ramiro's hand.

Gang testimony. While some of Johnson's testimony linked the graffiti to Norteno and the Brown Street Locos, most of the expert testimony supporting the gang-promotion enhancement came from Officer Stefenoni. Stefenoni had been a peace officer for four years, had completed at least 10 criminal gang investigations, the "vast majority" involving Norteno, and before that was a correctional officer with daily contact with gang members, including Norteno affiliates. The sufficiency of the enhancement evidence is not itself challenged on appeal, but Ramiro contends that the court improperly relied on hearsay from Stefenoni about Ramiro's gang moniker to establish Ramiro's identity for the underlying vandalism and that, without that hearsay, the vandalism count lacks substantial evidence.

Stefenoni testified that about 100 active and 100 inactive Norteno live in the Vacaville area, identify themselves with the color red and the number 14, have a "set or click" in Vacaville known as the Brown Street Locos (BSL), and commonly engage in crimes of assault, vandalism, intimidation, and attempted murder. In his opinion, the

graffiti in this case was Norteno, based on the common signs and symbols of the gang, including "NA" (Spanish for the letter N), "SK" (scrap killer), "X4" (a derivative of the number 14), and he concluded that "Little Savage," and perhaps "Loc," were gang monikers. In his opinion, the graffiti was definitely for the benefit of a gang, being a sign and warning to rival gang members of gang turf, and the area around the Jepson Middle School was, in his experience, Norteno turf.

Stefenoni also opined that each of the youths detained that evening were Norteno members. This opinion was based on the case facts, the youths' prior police contacts and associations, and his training and experience. He cited also the red belt and shirt worn by two of them and explained: "Commonly known gang members are getting a little more sophisticated how they identify themselves. They're not as flamboyant with the red that they commonly wear or the tattoos in which they show. More subtly black pants, white shirts is also one of the common clothing items that Norteno gang members are beginning to wear."

Specifically as to Ramiro, Stefenoni relied on two prior police contacts, police records showing him regarded as a Norteno, and his having a gang moniker, Little Sav or Little Savage, which also appeared on the west wall. He noted, right after his explanation of less-flamboyant color wear, that Ramiro wore black Nikes "with a red swoosh," and that two of the youths with him wore red. Richard, he testified, went by the moniker "Snoopy."

Ruling. The court ruled: "With respect to [Richard], I'm going to find that the People have not proven Count One beyond a reasonable doubt. I have the thing with the identification issue with respect to him both as to Count One and Two. . . . With respect to [Ramiro,] I'm going to find that the People have proven the case beyond a reasonable doubt. The presence of the spray paint [on] his hands, in addition to the other evidence regarding identification is sufficient. I'm going to find that he committed Count One. I'm going to find also that the enhancement with respect to the [Penal Code section 186.22, subdivision (d)] has been proven beyond a reasonable doubt, as well as the violation of probation alleged as Count Two."

DISCUSSION

I. *Gang Moniker Hearsay*

Because Ramiro's claims of insufficient evidence and erroneous admission of hearsay are interrelated, we take them in the reverse order presented, resolving first the hearsay question.

For context, we set out the full transcript passage where his counsel, Tehanita Taylor, raised objections based in part on hearsay and *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*), during examination of Stefenoni by prosecutor Haroon Khan: It was as follows:

"Q. And during the course of your investigation were you able to ascertain a moniker that Ramiro G[.] goes by?

"A. Yes, I was.

"Q. What is that?

"A. Little Sav or Little Savage.

"Q. Is it fair to assume that people out on the street would recognize Mr. Ramiro G.[] as Little Sav or Savage?

"A. Yes, they would.

"MS. TAYLOR: Objection, Your Honor. What's the foundation? Lack of foundation.

"THE COURT: Mr. Khan?

"Q. (By Mr. Khan) Where did you get this information from?

"A. I spoke briefly with Mr. G.['s] stepfather and he—

"MS. TAYLOR: Objection, Your Honor. Move to strike. This is a *Crawford* issue and hearsay.

"THE COURT: Overruled.

"THE WITNESS: I asked him if he had any nicknames, and he said other than going by Eddie he has seen the term Little Sav or Savage.

"Q. (By Mr. Khan) And based upon your training and experience . . . what effect did that have on your opinion that Mr. Ramiro G[.] is a member of a gang?

"A. Led me to believe that that's a moniker of his in the Norteno street gang and he, in fact, put that [m]oniker on the wall at Jepson that evening of this incident.

"Q. And did you see that moniker on the wall in the context of any other gang related items?

"A. I did.

"Q. What specifically?

"A. Several terms, signs and slogans that Norteno gang members commonly use.

"Q. You had an opportunity to observe the vandalism written on the west wall; is that correct?

"A. Yes."[2]

Ramiro's argument is that the court improperly admitted the hearsay on his gang moniker as *substantive evidence of his commission of vandalism*, and that this violated his federal constitutional right to confrontation under *Crawford*. He acknowledges settled case authority that a gang expert's reliance on hearsay as part of what fuels his opinions does not run afoul of *Crawford*, especially since the expert remains available for cross-examination on his opinions and their bases. (*People v. Thomas* (2005) 130 Cal.App.4th 1202, 1210; *People v. Ramirez* (2007) 153 Cal.App.4th 1422, 1426-1427.) Thus, in a case strikingly like ours, it was not *Crawford* error for a gang expert to use conversations he had with other gang members who related a minor's gang membership and monikers. (*People v. Thomas, supra*, at pp. 1208, 1210.)

Ramiro argues that, notwithstanding permitted use for expert opinion, it was *Crawford* error to use the hearsay to identify him, from the moniker's appearance in the graffiti, as one of the vandals. There are two problems with this argument.

---

[2] Ramiro's counsel later pursued this line of questioning in her cross-examination of Stefenoni. Stefenoni thought that the first phone call he made was to the stepfather, and he did not know where the stepfather got his information about the nickname. The stepfather told him he knew Ramiro had used the name Little Savage but "did not know how long or how often that's been a nickname of his." Stefenoni had not heard others used the name for Ramiro and had not asked any of the other youths' parents about it.

One is forfeiture for lack of a *specific* objection. "An objection is sufficient if it fairly apprises the trial court of the issue it is being called upon to decide. [Citations.] In a criminal case, the objection will be deemed preserved if, despite inadequate phrasing, the record shows that the court understood the issue presented. [Citations.]" (*People v. Scott* (1978) 21 Cal.3d 284, 290.) "What is important is that the objection fairly inform the trial court, as well as the party offering the evidence, of the specific reason or reasons the objecting party believes the evidence should be excluded, so the party offering the evidence can respond appropriately and the court can make a fully informed ruling. If the court overrules the objection, the objecting party may argue on appeal that the evidence should have been excluded for the reasons asserted at trial, but it may not argue on appeal that the court should have excluded the evidence for a reason different from the one stated at trial. A party cannot argue the court erred in failing to conduct an analysis it was not asked to conduct." (*People v. Partida* (2005) 37 Cal.4th 428, 435; Evid. Code, § 353, subd. (a).)

Counsel's *Crawford*/hearsay objection came during questioning of a gang expert on his opinions that Ramiro was a gang member and that the vandalism benefited a gang. (Pen. Code, § 186.22, subd. (d).) The court would have understood the objection to be that *Crawford* did not allow use of the hearsay *for those purposes*, and the overruling of the objection was consistent with the established case authority discussed above. The argument now, on appeal, is that *Crawford* did not allow use of hearsay for *the purpose of proving Ramiro's identity as a vandal*, and Ramiro's briefing concedes that this was a "second and distinctly separate analysis . . . ." The argument is forfeited.

It is also forfeited if, as the People candidly suggest, the expert strayed from the question asked of him and the scope of his expertise. Shortly after the *Crawford*/hearsay objection was overruled, Stefenoni was asked regarding the moniker, "And based upon your training and experience . . . what effect did that have on your opinion that Mr. Ramiro G[.] is a member of a gang?" He answered, "Led me to believe that that's a moniker of his in the Norteno street gang *and he, in fact, put that [m]oniker on the wall at Jepson that evening of this incident*." (Italics added.) Objection could have been made

at that point that the answer was partly nonresponsive or exceeded the scope of the question or the witness's expertise, but no such objection was made. Nor did counsel ask the court to limit the use of the hearsay to its proper scope. (Evid. Code, § 355.) A specifically grounded objection to evidence allows the trial judge to consider " 'limiting its admission to avoid possible prejudice. . . .' [Citation.]" (*People v. Partida, supra*, 37 Cal.4th at p. 434.)

Even if Ramiro could leap the forfeiture hurdle, his second obstacle is that the record does not show that the court made impermissible use of the hearsay to establish his identity as a vandal, as opposed to a gang member. Ramiro cites an initial, broad argument by the prosecutor that the "petition[s] on these minors" should be sustained, based in part on Ramiro's moniker and its presence on the west wall, but this did not refer specifically to identity on the vandalism charge. In fact, the prosecutor's later argument, just before the court ruled, scrupulously avoided any such use of the evidence for proving the vandalism charge.[3]

In the end, the court ruled: "With respect to [Ramiro,] I'm going to find that the People have proven the case beyond a reasonable doubt. The presence of the spray paint [on] his hands, in addition to the other evidence regarding identification is sufficient." As an aspect of the presumption that judicial duty is properly performed (see Evid. Code,

---

[3] "The evidence as far as these two minors is concerned, they match the description of the suspects. They're at or near the area where the vandalism occurred. Both of these minors are ID[']d at a lineup when [a] detective takes Mr. Cullinan to take a look at the four subjects. There is paint on [Ramiro's] hands. You can take a look at the record. Detective Stefenoni testified that the paint was on the index finger and the webbing of [Ramiro's] hand, which is consistent with holding a spray paint bottle, index finger and the webbing. And, furthermore, both minors were contacted a block away from Jepson which gives them ample opportunity to discard any spray paint cans that they might have taken with them. [¶] . . . These two minors match the description of the suspects. They're at or near the event when it occurs. They're identified by the eyewitness. The fact he says I might not have had my glasses shows the v[e]racity of this witness that he's not lying and exaggerating, making things up. He testified truthfully and so did Officer Stefenoni. He indicated oversight on my part. I didn't take photographs of [Ramiro's] fingers and his hand. But what motive would Officer Stefenoni have to testify to something that doesn't exist? Submitted, Your Honor."

§ 664), we presume "that the court knows and applies the correct statutory and case law [citation] and is able to distinguish admissible from inadmissible evidence, relevant from irrelevant facts, and to recognize those facts which properly may be considered in the judicial decisionmaking process. [Citations.]" (*People v. Coddington* (2000) 23 Cal.4th 529, 644.) Nothing in the court's ruling rebuts that presumption. Ramiro's contrary argument rests on fallacious reasoning that there was not enough "other evidence regarding identification" to support his conviction unless the court improperly considered the hearsay about his moniker. We reject that notion in the next part of this opinion.

In sum, claimed *Crawford* error is forfeited and, even if properly preserved, is not shown.

II. *Substantial Evidence of Vandalism*

Ramiro claims insufficient evidence to establish his identity as a vandal. "The same standard governs review of the sufficiency of evidence in adult criminal cases and juvenile cases: we review the whole record in the light most favorable to the judgment to decide whether substantial evidence supports the conviction, so that a reasonable fact finder could find guilt beyond a reasonable doubt. [Citations.]" (*In re Matthew A.* (2008) 165 Cal.App.4th 537, 540 (*Matthew A.*).)

Ramiro's challenge is not to the *fact* of the vandalism or its gang-related *nature*, but to who did the deed. He is right, of course, that eyewitness Cullinan identified him, at trial at least, as one of the youths at the dugout and therefore *not* one of the two he saw spray painting the west wall. We are not confined to that observed act, however, for the court was free to infer, especially from the 11 or so figures and symbols on that one wall, that there may have been more of the youths there than just the two he "startled" at that moment. There was also some fresh paint at the dugout and equipment container, where Cullinan saw Ramiro. Ramiro was distinctively attired, being the only one in long pants, and crucially, had gold paint on the index finger and webbing of one hand consistent with the color freshly painted on both the wall and the dugout area. Lack of a photograph left the gold paint on the hand a matter of credibility for the trial court that we cannot second guess. We infer in support of the judgment that the court concluded that the paint was

not just one to two days old (the time for sun and weathering effects to be noticed), but brand new. Cullinan said the painting on the west wall had not been there the day before. The court could discount the lack of fresh paint smell to the examination by an officer having occurred nearly an hour after Cullinan saw the painting going on. The court could attribute the lack of discarded spray paint cans at the scene to the youths having discarded them more discreetly and distantly, between the time of their sighting by Cullinan and their detention a block or two away. (See prosecutor's arguments at fn. 2, *ante*.)

Ramiro sees the court's dismissal of Richard's petition, over identity concerns, as bolstering his own argument. We do not. Richard, unlike Ramiro, had no paint on his hands, and the court faced a serious discrepancy between Cullinan's in-court testimony of Richard *not* being at the wall and the officers' testimony that he told them that night that Richard *was one of the two at the wall*. Thus, while Richard could have been one of the spray painters, and was certainly a member of the group responsible for it, the court was probably troubled by not knowing what he did to commit the vandalism or aid and abet its commission. Ramiro, by contrast, either sprayed paint himself or held the cans. Ramiro offered no testimony or statement as to how he came to have the incriminating paint on his hand.

Finally, the court could reasonably draw two standard guilt inferences as to Ramiro (and the others)—flight and false statements. (*People v. Bacigalupo* (1991) 1 Cal.4th 103, 127-128.) Flight (Pen. Code, § 1127c) was based on Cullinan's testimony that he thought he "startled" the two at the wall, for they walked away, and that all four "left, quickly," as soon as they were together at the dugout. The false statement was that, upon being detained by Officer Stefenoni near the school, they "collectively . . . said no" when he asked if they had been at the school.

Substantial evidence supports the conviction for vandalism.

III. *Statement of Maximum Term*

The court placed Ramiro in his mother's home, under probation supervision, yet also announced, after consultation with counsel off the record, a maximum confinement term of three years and eight months (less credits).

The parties agree that there was no need to state a maximum term, there being no removal from parental custody to trigger the need (§§ 726, subd. (c) [minor removed from parent's physical custody], 731, subd. (c) [minor held in physical confinement]), but they disagree about what to do. Ramiro asks that we strike the statement, as was done in *Matthew A.*, *supra*, 165 Cal.App.4th 537, 541; the People urge that we declare the statement to be of no legal effect, as was done in *In re Ali A.* (2006) 139 Cal.App.4th 569, 573-574 (*Ali A.*). The People have the better argument.

Ali A. reasoned that if the minor violated his probation, a further hearing would have to be held before he was subjected to a modified disposition order removing him from parental custody and that the court, "at *that* time," would have to comply with code sections "setting and/or declaring the maximum term of physical confinement. In the meantime, the maximum term of confinement contained in the current dispositional order is of no legal effect. Because the minor is not prejudiced by the presence of this term there is no basis for reversal or remand[.]" (*Ali A.*, *supra*, 165 Cal.App.4th at pp. 573-574, fn. omitted.) Further, any risk that a later judge might feel bound by the prior determination is obviated by the presence of the appellate opinion in the record. (*Id.* at p. 574, fn. 2.) That result also conforms to precedent not cited by *Ali A.*, which likewise found no need for corrective action. (See, e.g., *In re Danny H.* (2002) 104 Cal.App.4th 92, 106 [despite double punishment in the calculation]; *In re Joseph G.* (1995) 32 Cal.App.4th 1735, 1743-1744 & fn. 2 [despite double punishment and other error].)

Matthew A. cited no case precedent at all, but reasoned: "[Trial courts] utilizing this technique may have the best of reasons, such as 'sending a message' to the juvenile that the transgression was serious. But, if the Legislature thought that this should be done, it would have been easy to write the statute to permit this practice. We think it should cease. The criticism of this practice in prior opinions without actually ordering a correction for the disposition seems to have had little effect. Thus, our order is to strike the specification of a term of imprisonment [*sic*]." (*Matthew A.*, *supra*, 165 Cal.App.4th at p. 541.)

Unlike the court in *Matthew A., supra,* 165 Cal.App.4th 537, we have no indication that the trial judge was flouting the law, and we therefore see no need for coercive action or correction. The fact that the court and counsel went "off the record to calculate maximum time" shows that everyone assumed, in error, that the calculation was needed.

DISPOSITION

The calculation of the maximum term of confinement is of no effect; the judgment is affirmed.

_____
Richman, J.

We concur:

_____
Haerle, Acting P.J.

_____
Lambden, J.